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No. 01-___

IN THE

Supreme Court of the United States

OMAHA PUBLIC POWER DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the Federal Circuit's articulation and application of the "sovereign acts" and "unmistakability" doctrines.

2. Whether the wholly retroactive assessment at issue in this case, which requires private parties to pay $2.25 billion based on transactions dating back more than forty years, and which the government adopted with the avowed purpose of increasing the sales price of a commercial enterprise it was simultaneously divesting, violates the Takings or Due Process Clauses.

RULE 29.6 STATEMENT

Omaha Public Power District is a political subdivision of the State of Nebraska. It has no subsidiaries or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Omaha Public Power District respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the court of appeals in this case (Pet. App. 1a-16a) is reported at 271 F.3d 1357.[1] The panel opinion was entered under the constraints of a Federal Circuit *en banc* opinion (Pet. App. 40a-91a), which is reported at 271 F.3d 1327. The opinion of the Court of Federal Claims dismissing Petitioner's complaint (Pet. App. 17a-39a) is reported at 46 Fed. Cl. 29 (1999).

RELEVANT STATUTORY PROVISIONS

The Appendix (at 122a-141a) reproduces relevant provisions of Titles IX, X, and XI of the Energy Policy Act of 1992, Pub. L. No. 102-486 (Oct. 24, 1992) ("EPACT").

JURISDICTION

The Federal Circuit entered its opinion and order on November 20, 2001. On February 12, 2002, the Chief Justice extended the time to file this Petition to and including March 20, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

I. The Enrichment Contracts

The Energy Policy Act of 1992 ("EPACT") imposes retroactively more than $2.25 billion in assessments on utilities that purchased uranium enrichment services from the federal

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[1] The opinion addressed three separately docketed cases: *Maine Yankee Atomic Power Co.* v. *United States*, No. 99-5156; *Sacramento Mun. Util. Dist.* v. *United States*, No. 99-5158; and *Omaha Public Power Dist.* v. *United States*, No. 99-5160.

government prior to October 24, 1992.[2] Court of Appeals Joint Appendix ("J.A.") 2-3; 42 U.S.C. 2297g-1(c)-(e). The government built and began operating its enrichment facilities in 1945. J.A. 136. Until 1969, the enrichment plants were dedicated almost exclusively to national defense programs. *Id.* During that time period, the buildings, equipment, and property became fully contaminated with radioactive and other hazardous materials. *Id.* 137. The government was well aware of this contamination and of its eventual obligation to decontaminate and decommission the plants. *Id.* 139-40.

Congress amended the Atomic Energy Act of 1954 ("AEA") to enable the government to sell enrichment services directly to private parties starting in 1969. J.A. 137-38. As a result, although the government continued to support national defense requirements, the Atomic Energy Commission ("AEC") and its successor agencies including the Department of Energy ("DOE") began to sell enrichment services to commercial customers, such as Petitioner Omaha Public Power District ("Petitioner" or "OPPD").

Pursuant to Section 161(v) of the AEA, the government was required to publish written criteria setting forth the key terms of enrichment sales and to submit the criteria and any changes thereto for congressional approval. Under the contracts and the regulations governing the program, the government maintained complete control over all aspects of the operation of the enrichment facilities, the enrichment process, and the disposal of waste from the enrichment activities. J.A. 137. The government owned and was responsible for all uranium in its possession. Although customers were required to furnish unenriched uranium ("feed material"), the government took title to the furnished material. J.A. 68; Supplemental Appendix in Fed. Cir.

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[2] Facts concerning the government's uranium enrichment program and EPACT are also set forth in the Petitions for Certiorari, now pending before this Court, filed by three similarly affected utilities, and are incorporated herein by reference. *See* No. 01-1020, *Sacramento Mun. Util. Dist.* v. *United States*; No. 01-1155, *Maine Yankee Atomic Power Co.* v. *United States*; No. 01-___, *Commonwealth Edison Co.* v. *United States* (filed contemporaneously with this Petition).

No. 0050-69, *Commonwealth Edison* v. *United States* ("Com. Ed. A.S.A.") 2, ¶ 1. The government advised that it would not "necessarily use the specific feed material furnished by the customer" to produce the enriched uranium subsequently delivered" but would commingle the uranium in common stockpiles to be used at the government's discretion. *Id.* ¶ 5(a). The contracts further specified that the government would retain ownership of residual materials produced by the enrichment process – such as depleted uranium or "tails" – unless the customer opted to acquire it. *Id.* Title to enriched uranium would pass to the customer *only* upon delivery of the material. *Id.* ¶ 5(i).

Although a variety of contract forms were used, each of them contained common provisions that fixed the prices of the services at the government's published price in effect at the time of performance. J.A. 143. These "fixed-price" contracts further provided a ceiling price for the enriched uranium and stated that changes in the ceiling price or published rates could only be made with 180 days notice. J.A. 55.[3]

None of OPPD's contracts gave the government any right to revise the prices for uranium enrichment services following OPPD's payment for and receipt of those services. J.A. 146. Nor did the contracts contain any provisions indicating that OPPD could ever be subject to additional liability beyond the specified contract price. *Id.* 43-107. OPPD's contracts could not be amended without mutual agreement. Moreover, OPPD could terminate its contracts, in whole or in part, with a written notice of termination and payment of a termination charge. *Id.*

The government dominated the uranium enrichment market until the late 1970s, when viable foreign competition emerged. J.A. 144. The government soon became "the world's highest-priced supplier of enrichment services" and its market share

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[3] The effort involved in enriching uranium is customarily stated in terms of separative work units ("SWUs") – which is a measure of the effort necessary to produce a given quantity of enriched uranium. J.A. 143. The price for enrichment services was based on the number of SWUs necessary to produce the amount of enriched uranium acquired under the contracts. *Id.* at 139-41.

plummeted. *Id.* 144, 148; Joint Appendix in Fed. Cir. No. 0050-69, *Commonwealth Edison* v. *United States* ("Com. Ed. J.A.") 585, 532. DOE responded by developing a new contract and launching an "extensive marketing campaign" to induce OPPD (and other utilities) to remain customers. J.A. 145; Com. Ed. J.A. 59. DOE offered more flexible terms, lower prices (including a "double price guarantee" (Com. Ed. J.A. 61)), promises that prices would be controlled in the future, and representations by high-ranking government officials that the contract prices represented the full amounts utilities would be obligated to pay for the services. J.A. 160; Com. Ed. A.S.A. 60-64.

Based upon the government's representations, OPPD entered into settlement agreements with the government that terminated OPPD's existing contracts and released it from any additional liability thereunder. OPPD then executed new contracts with the government. It is undisputed that, in reliance on the fixed-price nature of the enrichment contracts and government representations regarding all-inclusive pricing, OPPD bypassed opportunities to purchase enriched uranium from other sources.

II. EPACT Imposes Retroactive Liability.

By 1992, the government's share of the uranium enrichment market dwindled further and DOE lobbied Congress to exit the business. J.A. 17. The government's exit strategy turned on creating a government-owned corporation, the United States Enrichment Corporation ("USEC"), which would perform enrichment services on a "profitable and efficient basis" in order to "maximize the long-term value of the Corporation to the Treasury," followed by the eventual sale of the enterprise to private investors. 42 U.S.C. 2297c-2(d), 2297c-5, *repealed by* USEC Privatization Act, 42 U.S.C. 2297h-5(d). Recognizing that liability for decontaminating and decommissioning expenses would depress USEC's sales price and hence substantially reduce the profits to the U.S. Treasury, the government essentially transferred the assets of its enrichment business to USEC but retained liability for environmental remediation. J.A. 149. See generally H.R. Rep. No. 102-474,

Part 2, *reprinted in* 1992 U.S.C.C.A.N. 2064. Pursuant to this arrangement, the government sold USEC to private investors in 1998 for *$1.4 billion*. James K. Glassman, *The Inside Scoop*, WASH. POST, Aug. 30, 1998, at H1.

The government established a Decontamination and Decommissioning Fund ("D&D Fund") to finance its clean-up responsibility. See 42 U.S.C. 2297g-1 *et seq.*; 10 C.F.R. 766.1 *et seq.* The D&D Fund was also designed to defray other expenses unrelated to the government's operation of the enrichment plants. Most significantly, EPACT allocated up to $310 million to clean up *privately owned and operated* thorium and uranium production facilities. 42 U.S.C. 2296a (1992). This amount has been periodically increased, so that up to *$490 million* of the D&D Fund may now be allocated to clean up private facilities that have no nexus whatsoever to the uranium enrichment contracts. Pub. L. No. 105-388, § 11(a).[4]

To help finance the D&D Fund, Congress imposed a "special assessment" of up to $150 million per year (adjusted for inflation) for fifteen years on "domestic utilities" that had purchased government-enriched uranium. 42 U.S.C. 2297g-1(c)-(e). The amount of each utility's assessment is based upon the quantities of government-enriched uranium it purchased prior to October 24, 1992. OPPD has paid more than $11 million in assessments and will ultimately be required to pay more than $19 million in assessments as a result of purchases completed as long ago as 1969.

It is undisputed that OPPD's D&D Fund liability is "not premised upon any responsibility for contamination" at the plants and, indeed, that EPACT does not base liability on either "causation or culpability for contamination." Resp. C.A. Br. ("Gov't Br.") 28, 41. Indeed, a 1992 government-sponsored study makes clear that the government's facilities were contaminated *before* OPPD made any of its purchases: "In 1969, when commercial production began, the diffusion plants

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[4] The Federal Circuit's citation of a figure of $75 million (Pet. App. 72a, n.19) is misleading because that amount represents only expenditures to date.

were already contaminated and the need to conduct D&D well established." J.A. 177; see also Pet. App. 6a. Moreover, the same study concluded that "the level of decontamination effort required for [the enrichment facilities] *is no greater now than the effort that would have been required in 1965 if all the facilities had been required to have been decommissioned at that time*." J.A. 176 (emphasis added). Further, there is no nexus whatsoever between OPPD and the private thorium and uranium enrichment plants funded by D&D Fund assessments.

Likewise, as the government has conceded, "the assessments are not premised upon any promise made by OPPD," contractual or otherwise. Gov't Br. 28. Rather, as the government asserts, the only rationale articulated by Congress in support of the billions of dollars in retroactive liability on former customers of the government's enrichment enterprise is that the assessments are justified because the utilities "benefited" from receipt of the enrichment services they purchased. *Id.* 40.

There is no dispute that the utilities paid the contractual price the government specified for the "benefit" of receiving the enriched uranium purchased under the contracts. J.A. 146. While Representative Phillip Sharp, one of the sponsors of EPACT, asserted in a floor statement that the assessments were justified because the utilities purchased the enriched uranium at "below market price," that claim is flatly incorrect.[5] By the mid-1970s, the government acknowledged that its uranium enrichment prices were generally "*the highest in the world.*" Com. Ed. J.A. 585 (emphasis added). Indeed, the impetus

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[5] Com. Ed. J.A. 470. Representative Sharp also claimed that domestic utilities benefited from saving the cost of building their own plants. However, this "benefit" is illusory. First, the Government has never approved or licensed the construction of *any* commercial uranium enrichment facility in the United States. Second, the emergence of foreign competition and the secondary market for enrichment services obviated any consideration of building a commercial enrichment facility. Third, there is no evidence indicating that, if OPPD had built a plant, it would have been anything but tremendously successful. In any event, building a plant or obtaining uranium from other sources would have enabled OPPD to avoid D&D Fund liability altogether.

behind privatizing the enrichment enterprise was that the government could not compete effectively with other producers.[6] A more apt explanation was contained in the testimony of DOE Assistant Secretary Young, who asserted that retroactively imposing additional charges for environmental clean-up on utility customers was appropriate: "[S]ince we did not pass those costs on in the past, we feel it is equitable to pass those costs on in the future." Com. Ed. A.S.A. 305.[7]

III. The Proceedings Below

OPPD's amended Court of Federal Claims complaint asserts that the retroactive D&D Fund assessment: (1) constitutes an unlawful taking; (2) violates due process; and (3) breaches the fixed-price terms of its contracts with the government. J.A. 132-64. The court granted the government's motion to dismiss the complaint for failure to state a claim. See Pet. App. 18a. While OPPD's appeal was pending, the Federal Circuit *sua sponte* ordered that a parallel suit brought by Commonwealth Edison Company be heard *en banc*, and the *en banc* court affirmed by a divided vote the lower court's dismissal of a similar challenge to EPACT. See *id.* 40a-41a.

a. In *Commonwealth Edison*, the Federal Circuit held that the Court of Federal Claims has *exclusive* trial jurisdiction, and that the Federal Circuit thus has exclusive appellate jurisdiction, over the great majority of challenges to retroactive federal exactions. See Pet. App. 54a-55a. Addressing the merits, the *en*

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[6] See Com. Ed. J.A. 454-59. Congress noted that DOE's lack of competitiveness was "ironic" because DOE's "factory costs" for producing enriched uranium were relatively low. However, prices had become noncompetitive because "artificially inflated costs" had been imposed upon it by other government agencies. *Id.* 455.

[7] Mr. Young conceded that the "driving force" behind the cost of decontaminating the plants was the mere fact they were contaminated in the first place – not the level of the contamination. A.S.A. 303. Mr. Young further conceded that the vast majority of the costs required for remediation were directly traceable to a period when the government operated the plants exclusively for government programs. *Id.* OPPD has alleged that the prices it paid necessarily included all costs that could be properly allocated to it. J.A. 146.

banc majority first rejected Commonwealth Edison's takings claim based on the views of five Justices in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), that an order to pay money, without more, cannot constitute a taking. Pet. App. 59a (citing 524 U.S. at 540 (1998) (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting)). The *en banc* majority furthermore rejected Commonwealth Edison's claim under the Due Process Clause. Conceding that the special assessments were "severely retroactive and costly" (*id.* 70a), the majority held that they were properly sustained under the two-part test that the court articulated to govern such claims: (1) "the party subjected to the retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party"; and (2) "the imposition of retroactive liability would not be contrary to that party's reasonable expectations." *Id.*

b. On the contracts issue, the *en banc* court adopted the view of a prior divided panel decision in *Yankee Atomic Electric Company* v. *United States* (see Pet. App. 60a-61a). In that case, the panel majority reversed a decision of the Court of Federal Claims holding that the EPACT assessments violated the government's contractual agreements to supply enriched uranium at fixed prices. *Id.* 92a. Yankee argued that the Government was bound by its contractual promise to charge a fixed price and furthermore to assume the risk that its costs would be higher than expected. The majority acknowledged this Court's determination that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States* v. *Spearin*, 248 U.S. 132, 136 (1918), *quoted at* Pet. App. 109a. The majority thus conceded that the fixed-price enrichment contracts would "bar the Government from deliberately attempting to charge more for the performance of those contracts." Pet. App. 111a. However, the panel held that the government's imposition of the assessments was immune from any claim under the contracts if it could satisfy the "sovereign acts" or "unmistakability" doctrines. *Id.* 114a.

The court rejected Yankee's contract claim, deeming the assessments a "public and general" sovereign act, and concluding that the Government had not made an "unmistakable" promise not to impose the assessments. Pet. App. 114a. The panel held that the assessments are a sovereign act because they do not fall *exclusively* on parties that contracted directly with the government. *Id.* 103a. The court further held that the fixed-price terms of the contract did not constitute an "unmistakable" promise that would protect utilities from subsequent legislation that required them to pay additional costs based upon the same services. *Id.* 110a.

Chief Judge Mayer dissented, emphasizing that the fixed-price contracts deliberately placed the risk of any increased costs arising from performance of the contracts on the government. Pet. App. 115a, 117a. In his view, the D&D Fund's special assessments "effectively require[d] Yankee to pay for the additional costs the government incurred as a result of performing the enrichment services; the very same costs for which the government assumed the risk." *Id.* 117a. In Chief Judge Mayer's view, it was of no import that a small portion of assessments fell on parties that had indirectly purchased government-enriched uranium, because the impact of such assessments "falls substantially on the government's contracting partners." Pet. App. 118a (citing *United States* v. *Winstar Corp.*, 518 U.S. 839, 902-03 (1996) (plurality)). Finally, Chief Judge Mayer rejected the majority's application of the "unmistakability" defense, emphasizing that the parties had agreed through the fixed-price contracts to place the risk of future costs on the government. *Id.* 119a-20a.

c. The panel in this case contemporaneously issued an opinion under the constraints of the *en banc* decision (including the *en banc* court's adoption of the *Yankee Atomic* opinion), and dismissed the claims of OPPD and two other utilities. Pet. App. 1a-16a. But for the *en banc* decision, the panel would have held that the assessments violated due process. Three dissenting members of the *en banc* court adopted the panel opinion. See *id.* 91a (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* 4a (Friedman, S.J., joined by Mayer, C.J.). The dissenters

emphasized that the *government* alone bore responsibility for causing the contamination. *Id.* 11a. Furthermore, "when the [u]tilities entered into the [enrichment] purchase contracts at a fixed price, they had no reason to believe, or even suspect, that years later the government would seek to make them pay for a substantial portion of its cleanup costs." *Id.*

This Petition followed.[8]

REASONS FOR GRANTING THE WRIT

For two reasons, certiorari should be granted to review the Federal Circuit's holding (adopted by the *en banc* court in the *Commonwealth Edison* case) that the EPACT assessment is not invalid as contrary to the government's contractual obligations. *First*, the Federal Circuit has extended the "unmistakability" and "sovereign acts" doctrines far beyond the context approved by this Court. Unlike cases such as *Winstar*, Petitioner does not rely on any promise by the government not to exercise its sovereign authority. Rather, the government simply agreed to charge Petitioner a fixed price for a product and agreed to assume the risk that its own costs (including costs arising from environmental issues) would be higher than anticipated. The "unmistakability" and "sovereign acts" doctrines have no role to play in this context, and the Federal Circuit's contrary decision calls into question the federal government's reliability as a contracting partner with respect to even the most "humdrum supply contract," particularly given the Federal Circuit's exclusive jurisdiction over government contracts claims.

Second, in the event this Court determines that the government's sovereign defenses to contract claims do apply, this case is an ideal successor to *Winstar*, which has generated substantial uncertainty in the lower courts. In particular, this case presents the opportunity to articulate a clear standard regarding the circumstances in which the "unmistakability"

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[8] Question 2 presented by this Petition addresses Petitioner's constitutional challenges to the EPACT assessment. As to that Question, Petitioner adopts by reference the Petition for Certiorari contemporaneously filed in the *Commonwealth Edison* case.

doctrine is triggered. Similarly, only four Justices in *Winstar* addressed the facts under which the "sovereign acts" doctrine applies, and that issue is squarely presented in this case because the government's overriding purpose in imposing the EPACT assessment was its own self-interest in generating profits from the sale of USEC.

I. Certiorari Should Be Granted Based On The Importance Of the *En Banc* Federal Circuit's Construction Of The "Sovereign Acts" and "Unmistakability" Doctrines.

a. This Court should grant certiorari to review the *en banc* Federal Circuit's broad holding that the "sovereign acts" and "unmistakability" doctrines apply to cases that do not even ostensibly involve any supposed promise by the government to impair the exercise of its sovereign authority. Under this Court's precedents, those doctrines protect the government from liability when "sovereign acts, needful for the public good, will incidentally disable [the government] or the other party from performing one of the promised acts." *United States* v. *Winstar Corp.*, 518 U.S. 839, 921 (1996) (Scalia, J., concurring). The point of such uniquely sovereign defenses is thus to put the government on equal footing with private contractors. The classic statement of the law is that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing S.E.* v. *United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. at 895 (plurality), quoting in turn *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)).

Thus, although the government has no special privilege as a contracting party, neither does it assume special liabilities. In particular, in the event of a sovereign regulatory change, the government is no more liable than would be a similarly situated private party, which would have resort to the doctrine of impossibility. The only exception is for situations in which the government makes a sufficient promise against sovereign action, either by "indemnifying its contracting partners against financial losses arising from regulatory change" (*Winstar*, 518 U.S. at 887

(plurality)) or by unmistakably "promis[ing] to regulate them in a particular fashion" (*id.* at 921 (Scalia, J., concurring)).

Winstar and similar cases thus addressed assertions by private parties that the government had made a contractual commitment to engage in, or abstain from, sovereign actions. In particular, those decisions addressed whether and when the government "as contractor" must make an "unmistakable" promise in order to be deemed bound by a contract, and thus required to pay damages, in the event the government "as sovereign" adopts a regulatory change that breaches the supposed contractual promise. See *Horowitz* v. *United States*, 267 U.S. 458 (1925) (contractor not entitled to damages when embargo prevented government from performing contract); *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (government not liable for damages when change in Social Security Act eliminated right of state employees to withdraw from coverage); *United States* v. *Cherokee Nation of Okla.*, 480 U.S. 700 (1987) (government not liable for damages because grant of ownership of a river bed did not abrogate government's right to regulate the navigability of the river); *D & L Construction Co.* v. *United States*, 185 Ct. Cl. 736 (1968) ("while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign," it can agree to compensate a party for damages resulting from exercise of sovereign power).

In *Winstar* itself, this Court held that the government was required to pay damages under its contracts with private banks despite the enactment of provisions in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") that prevented the government from providing the promised regulatory treatment. A plurality held that the unmistakability doctrine was irrelevant because the government had promised to pay the banks in the event of regulatory change (518 U.S. at 887) – a risk-shifting promise that did not implicate its sovereign powers – and furthermore held that the sovereign acts doctrine was irrelevant because the government could not establish an impossibility defense given that the parties were aware of the risk of regulatory change at the time of contracting (*id.* at 908-

10). Three concurring Justices equated the unmistakability and sovereign acts doctrines, concluding that both are satisfied "whenever it is clear from the contract in question that the Government was *committing itself not to rely upon its sovereign acts* in asserting (or defending against) the doctrine of impossibility." *Id.* at 923 (Scalia, J.) (emphasis added). The concurrence held that both doctrines were applicable, but that they were both satisfied, because the government had made an unmistakable promise not to change the regulatory framework. *Id.*

Petitioner's claims would thus be subject to the "sovereign acts" and "unmistakability" doctrines if Petitioner were relying on a supposed promise by the government not to engage in sovereign regulation. That would be true if, for example, EPACT had changed the governing regulatory scheme by banning any party (including the government) from enriching or transporting uranium. In response to the utilities' suit contending that the government was liable for failing to fulfill its supply obligations in that circumstance, the government's defense would be that the regulatory change made performance impossible. Under the "unmistakability" and "sovereign acts" doctrines, the utilities could prevail only if, in the contracts, the government had (a) promised to indemnify the utilities in the event of regulatory change or could satisfy the impossibility doctrine (according to the *Winstar* plurality), or (b) promised not to change the regulations in the future at all (according to the concurrence).

b. Certiorari is warranted because the *en banc* Federal Circuit refused to limit the "sovereign acts" and "unmistakability" doctrines to their previously recognized role of imposing a heightened burden when a private party claims the government committed itself by contract not to engage in sovereign regulatory change. The contractual "promise" on which Petitioner relies is not a promise by the government to abstain from regulation, or even to indemnify Petitioner in the event of such an exercise of sovereign authority. Rather, the government's agreement to provide enriched uranium at a fixed-price is merely a "garden variety" promise (*Winstar*, 518 U.S. at

911 (plurality)) wherein the seller (here, the government) agreed to charge a fixed price and to assume a "risk" – *viz.*, the risk that the costs associated with production of enriched uranium would be higher than anticipated.[9]

That the fixed-price enrichment contracts allocated the parties' rights and responsibilities in this fashion is not disputed. Long ago, this Court made clear that "[w]here one agrees to do, for a fixed price, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." *Spearin* v. *United States*, 248 U.S. 132, 136 (1918). Long-standing Court of Federal Claims precedent similarly recognizes that "the [seller] in a fixed-price contract assumes the risks of unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices." *ITT Arctic Servs.* v. *United States*, 524 F.2d 680, 691 (1975). See also *Dalton* v. *Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (CAFC 1996) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the [seller] that the actual cost of performance will be higher than the price of the contract."). That basic principle of contract law applies fully to the Government. See *Mobil Oil*, *supra*.[10]

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[9] The Federal Circuit acknowledged this point in the *Yankee Atomic* decision: "To be sure, the contracts at issue in the present case may be viewed as risk-shifting agreements, similar to those that the *Winstar* plurality found not to implicate the unmistakability doctrine." Pet. App. 109a.

[10] Although it thus makes no difference at what point the government realized its costs were higher than anticipated, the Federal Circuit was manifestly wrong in stating that EPACT was intended to spread "later discovered costs of contamination." A DOE study explains that, "[i]n 1969, when commercial production began, the diffusion plants were already contaminated and *the need to conduct D&D well established.*" J.A. 177 (emphasis added). Moreover, starting in the 1970s, DOE repeatedly rebuffed GAO recommendations to include in its prices for enrichment services a discrete element for anticipated decontamination expense. Com. Ed. J.A. 576. The fact that the government would someday face expenses for decontaminating its plants was well understood from the inception of the

Nor is it disputed that the EPACT assessment abrogates the Government's promise to take on the risk of additional costs. DOE thus made clear in testimony before Congress that the assessments sought additional money from the government's "commercial customers" to pay for clean-up costs the government planned to retain in conjunction with its plan to spin off its enrichment business to the private sector. Com. Ed. A.S.A. 305. The bold justification for imposing such additional costs was simply stated: "since we did not pass those costs on in the past [under the enrichment contracts], we feel it is equitable to pass-those costs on in the future." Com. Ed. A.S.A. 305.

The contrast between this case and *Winstar* is once again illustrative. In *Winstar*, the government encouraged banks to take over failing thrifts through favorable accounting treatment. But suppose that the government had instead seized the thrifts and sold them to banks for a fixed price calculated to cover the thrifts' losses. Under settled principles (see *supra* at 14), the contract would assign to the government the risk that it had underestimated the correct sales price. Suppose further that, long after the transactions had closed, Congress concluded that the thrifts' losses were higher than anticipated and decided to recoup the government's losses by adopting a multi-billion-dollar assessment payable by the banks or their successor purchasers. A suit by the purchasing banks based on the contracts would simply rely on the government's promise to charge a certain price, which has nothing to do with a promise by the government not to utilize its sovereign regulatory authority. In other words, no government regulation would prohibit the sales from occurring as originally agreed. But on the *en banc* Federal Circuit's holding in this case, the unmistakability and sovereign acts doctrines would apply, making the price terms of the banks' contracts *meaningless* because they contained no unmistakable promise that the government would not later shift the allocation of financial risks.

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commercial sales programs, and the government entered into the enrichment contracts with full knowledge of this fact.

In this fashion, the Federal Circuit's decision transforms doctrines intended as shields for the government from inequitable treatment in the face of regulatory change into swords with which the government can abrogate its contractual obligations. The government's sovereign defenses to contract claims have never before been applied to immunize governmental action specifically designed to "abrogate the essential bargain of the contracts at issue." *Winstar*, 518 U.S. at 924 (plurality). The decision below, however, holds that a private party must secure not only a promise from the government to take on a financial risk, but also a *second* promise that the government will not later realign that risk by regulation. Cf. *Winstar*, 518 U.S. at 922 (Scalia, J., concurring) ("Indeed, it is hard to imagine what additional assurance that the course of regulation would not change could have been demanded – other than, perhaps, the Government's promise to keep its promise. That is not what the doctrine of unmistakability requires."). Thus, the Federal Circuit held that Petitioner could be required to assume the costs of environmental remediation in this case because, although the government plainly took on that risk in the contracts, the contracts do not "unmistakably" promise that the government would not later reassign the costs to the utilities. Pet. App. 112a.[11]

c. The *en banc* Federal Circuit's holding thus marks a sea change in the law that merits this Court's review because it cannot but seriously undermine the private sector's faith in the government "as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883 (plurality). The Court of Federal Claims (and thus the

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[11] This case accordingly presents facts similar to *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), in which this Court held that a state-imposed "pension funding charge" constituted an unconstitutional impairment of contract. The assessment did not abrogate any explicit contractual agreement between the plan sponsors and participants, but rather imposed an *additional* obligation that fundamentally changed the nature of their bargain. In addition, this Court found it significant that the assessment was retroactive, was imposed in an area in which reliance on prior law was critical, was targeted at a specific set of contracts, and was not directed at any generalized economic or social problem.

Federal Circuit) has essentially exclusive jurisdiction to resolve claims against the government for breach of contract. See 28 U.S.C. 1491(a)(1). Subsequent cases will be governed by the test announced in this case because the court of appeals' articulation of the "unmistakability" and "sovereign acts" doctrine is broadly applicable, and in no way limited to EPACT or the nuclear industry.

The importance of the decision below is heightened by the fact that, although few government contracts allocate the risk of regulatory change (as in *Winstar*), essentially *every* government contract addresses the basic exchange of a good or service for money. The *Winstar* plurality pointed out that, "in the world of regulated industries, * * * the risk that legal change will prevent the bargained-for performance is always lurking in the shadows." 518 U.S. at 869. The decision below, by contrast, governs the mine-run of government contracts, in which the price to be paid and the services to be delivered are not merely in the shadows but front and center in klieg lights.

Thus, the decision below extends what were previously narrow doctrines to a circumstance in which previously "no one would seriously [have] contend[ed]" they applied: "humdrum supply contracts." *Winstar*, 518 U.S. at 880 (plurality). In this particular case, the risk assumed by the government is the cost of cleaning up pollution, but it could just as easily be the risk of higher costs for supplies or transportation, or even for employee salaries or pensions. It is not disputed that the "second promise" required by the *en banc* Federal Circuit is utterly unheard of in government contracting and any such requirement throws the reliability of the United States as a contracting partner squarely into question.

II. Certiorari Should Be Granted Because This Case Is A Natural Successor To *Winstar*.

Apart from the Federal Circuit's unwarranted extension of the "unmistakability" and "sovereign acts" doctrines beyond cases presenting a supposed governmental promise not to exercise its sovereign authority, certiorari is also warranted because this case presents an important opportunity for this

Court to resolve the uncertainty that exists in the wake of its fragmented decision in *Winstar*. As has often been repeated, "Courts have struggled with the meaning of *Winstar*." *Tamarind Resort Assocs.* v. *Gov't of the Virgin Islands*, 138 F.3d 107, 112 (CA3 1998), *quoted in Pitney Bowes, Inc.* v. *USPS*, 27 F. Supp. 2d 15, 23 (DDC 1998), *and United States* v. *Wetlands Water Dist.*, 134 F. Supp. 2d 1111, 1145 (EDCA 2001). As recently detailed by a federal district court:

> Although seven Justices formed the majority to support the *Winstar* unmistakability judgment (*i.e.*, that it did not shield the government from liability), there was not a majority opinion, and the four separate opinions are thoroughly fragmented, not articulating any unified analysis in support of the judgment based on either the unmistakability or sovereign acts doctrines.

Wetlands Water Dist., 134 F. Supp. 2d at 1146-47. See also Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177, 1222 (2000) (noting "the significant unresolved and ambiguous points that flow from the decision of the splintered majority in the Supreme Court"). This case is an ideal vehicle to provide needed clarity in the law.

No majority of the Court in *Winstar* articulated a test governing the circumstances in which the unmistakability doctrine is triggered. The four-Justice plurality broadly concluded that the doctrine is irrelevant whenever, as in this case, the plaintiff seeks not to block the government's exercise of its sovereign authority but rather to enforce a risk-shifting agreement by the government. 518 U.S. at 88. The three concurring Justices, writing in that case only "briefly" (*id.* at 919), disagreed that risk shifting obviates the unmistakability doctrine in one particular context: cases in which the plaintiff's claim turns on a supposed promise by the government not to exercise its sovereign power to regulate (*id.* at 921). Given the limited reach of the *Winstar* concurrence, no majority of the Court addressed whether the unmistakability doctrine applies in the much more common circumstance (presented by this case) in

which the government assumed the basic risk of liability from unexpected costs, not the risk of sovereign regulation.

"As a result of these shifting positions, it appears particularly problematic to predict which unmistakability standard applies to any specific contract." *Wetlands Water Dist.*, 134 F. Supp. 2d at 1148. Indeed, "[u]nfortunately, but not unsurprisingly, given the Supreme Court opinion, the few cases applying the unmistakability doctrine after *Winstar* (most from the Federal Circuit) also diverge in their formulation and interpretation of the doctrine." *Id.* As the Court of Federal Claims – the principal federal court adjudicating government-contractor disputes – has bluntly stated, "This court, and, undoubtedly, many others would welcome further clarification" of the status and scope of the unmistakability doctrine. *Adams* v. *United States*, 42 Fed. Cl. 463 (1998).

The essential need for further guidance from this Court after *Winstar* is even more apparent with respect to the "sovereign acts" doctrine. Long-standing precedent holds that the doctrine applies to "public and general" acts of the government (*Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)), but this Court has not yet decided what constitutes a "public and general" act when, as in this case, the government acts not merely for the public good but also for its own fiscal self-interest. Only four Justices in *Winstar* addressed the issue: three members of the plurality concluded that the doctrine does not apply when governmental regulation has a "substantial effect" on the government's own contractual obligations (518 U.S. at 896-99)[12]; the Chief Justice disagreed in dissent (*id.* at 926-27). The *Winstar* concurrence found it unnecessary to articulate any more general test because, in its view, "it was an unquestionably sovereign act of government – enactment and implementation of provisions of FIRREA regarding treatment of regulatory capital – that gave rise to respondents' claims of

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[12] See also *Winstar*, 518 U.S. at 897-98 (plurality) ("governmental action will not be held against the Government for purposes of the impossibility defense so long as the action's impact upon public contracts is * * * merely incidental to the accomplishment of a broader governmental objective").

breach of contract." 518 U.S. at 920. Justices O'Connor and Ginsburg did not join any opinion addressing the issue. The result is "a 3-1 splintering (Justices Souter, Stevens, and Breyer versus [Chief] Justice Rehnquist)." *Wetlands Water Dist.*, 134 F. Supp. 2d at 1152.

This case squarely presents the issue for decision. The Federal Circuit held that the EPACT assessment is a "sovereign act" because – although it is targeted at the government's "promise" to charge a certain price and the very "risk" allocated by the contracts (that the government would incur additional costs) – the assessment is not imposed *only* on the government's direct contracting partner. Pet. App. 103a. However, it is undisputed that *at least eighty-five percent* of the cost of the D&D Fund assessments fall on utilities that contracted directly with the government. Pet. App. 118a. There is no serious dispute that, on any number of other formulations of the sovereign acts doctrine – including the *Winstar* plurality's view that the doctrine does not apply when the government's action "substantially affects" its contractual obligations – the Federal Circuit's test is erroneous as a matter of law.[13]

This is a particularly appropriate vehicle for this Court to address the extent to which the government's self-interest affects the "sovereign acts" doctrine. The Court has engaged in more searching review of self-interested governmental exactions in both the Contract Clause and Due Process Clause contexts. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (Due Process Clause) (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (Contract Clause); see also *Eastern Enterprises*, 524 U.S. at 544 (heightened scrutiny applicable to "the Government's self-enrichment") (Kennedy, J., concurring). Three members of the *Winstar* plurality took the view in that case that "the greater the Government's self-interest * * * the more suspect becomes the claim that its private contracting

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[13] As previously stated, the legislative history of EPACT makes clear that the government principally targeted its "commercial customers."

partners ought to bear the financial burden of the Government's own improvidence." *Winstar*, 518 U.S. at 898. As noted, the concurrence and Justices O'Connor and Ginsburg did not reach that issue, so it remains unresolved.

For its part, the Federal Circuit eschewed any consideration of the blatant self-dealing that permeates EPACT. For decades the government generated enormous revenues by furnishing enriched uranium to commercial customers under fixed-price contracts. After electing to sell its uranium enrichment business to private investors, the government significantly enhanced the value of the enterprise by agreeing to retain responsibility for cleaning up its enrichment plants. This ploy was ultimately successful and yielded the Treasury $1.4 billion. However, not content with this profit, the government also shifted a staggering $2.25 billion in plant-related costs onto its former customers by imposing the EPACT assessments. Although the government's pecuniary interest in garnering this revenue is obviously strong, its justifications – that the utilities "benefited" from receipt of enriched uranium and had not been previously charged for plant clean-up costs (Com. Ed. A.S.A. 305) – ring hollow. Under their fixed price contracts, the utilities paid the specified price for the benefits they received and it is indisputable that the government bore the risk of all costs arising in connection with the performance of the contracts.

In this respect, the Federal Circuit's test is also in considerable tension with the standard applied by both the Ninth and the Tenth Circuits. The Ninth Circuit has recently held that the "sovereign acts" doctrine was inapplicable to "a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered." *Kimberly Assocs.* v. *United States*, 261 F.3d 864, 879 (2001). The Tenth Circuit holds that the "sovereign acts" doctrine applies only "when the government enacts legislation of general applicability for the benefit of the general welfare and such legislation inadvertently affects the government's performance of a contract to which it is a party." *Resolution Trust Corp.* v. *Federal Sav. & Loan Ins.*

Corp., 25 F.3d 1493, 1501 (1994). EPACT unquestionably fails both those standards.

The Federal Circuit's test also merits review because it is essentially arbitrary, for it bears no relationship to the interests protected by the sovereign acts doctrine. The provision of EPACT that the Federal Circuit found critical is merely a cost-pass-through device. Recognizing that utilities sometimes resold, or transferred their right to receive government-enriched uranium to other parties, EPACT provides that "a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department but purchased by the utility from another source." Pet. App. 138a. This provision merely passes the liability imposed by the assessment through the prime contractor, elevating the subsequent buyers to the same status as the original purchaser. The fact that the government used its legislative power to pass through costs associated with the assessments does not disguise the fact that the assessments breach the government's *original* promise to provide the enriched uranium at a fixed price. The sovereign acts doctrine was never intended to support such a direct abrogation of a contractual promise.[14]

III. The Question Presented Is A Natural Companion To The Parallel Petitions Presenting Constitutional Challenges To The EPACT Assessment.

Certiorari is also warranted because the contracts question raised by this case presents the Court with the opportunity to consider, in a comprehensive fashion, the legality of the EPACT

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[14] In other circumstances, the Federal Circuit's test is arguably *under*-protective of the government's interests. The court of appeals indicated that a regulation limited exclusively to the government's contracting partners would not be protected as a "sovereign act." See Pet. App. 61a. Imagine, however, that the government, for security reasons, enacted a previously unforeseeable ban on transporting uranium from its enrichment facilities under the contracts, rendering the government's performance impossible. Although that hypothetical is far closer to the prototypical instance in which the sovereign acts doctrine should protect the government from liability, it would be excluded under the Federal Circuit's standard.

assessment, which is, for the reasons described in the various petitions for certiorari now pending, a statute of considerable importance. The contract issue presented by this Petition is a logical predicate to the constitutional challenges to the statute, not only because it presents a narrower ground on which to resolve the case but also because the utilities' rights under the contracts inform their expectations under the Takings and Due Process Clauses that they would not be subject to retroactive liability. See Pet. App. 75a (holding of *en banc* majority that contracts created no protected expectations); Pet. for Cert., No. 01-___, *Commonwealth Edison Co.* v. *United States* (challenging that determination).

The contractual and constitutional issues are bound up together for the further reason that the Federal Circuit decided them on inconsistent premises. Thus, in its contract ruling, the court of appeals maintained that the scope of the environmental risk from enrichment was not known until the mid-1980s. See Pet. App. 94a. In its constitutional rulings, by contrast, the court held that Petitioner had no expectation against retroactive liability because the environmental risks had been known for decades. See *id.* 76a. Another example is the Federal Circuit's determination, in the contract ruling, that the assessment is not a retroactive price increase because it is indistinguishable from a sovereign tax. See *id.* 103a. In the constitutional ruling, by contrast, the court held that the assessment is *not* a tax. See *id.* 64a. Thus, the assessment was not subject to this Court's precedents holding that imposing new taxes based upon past actions offends due process and only a very limited period of retroactivity can be tolerated. See *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1927) (new tax based upon "past lawful transactions * * * beyond recall" violated due process); *Blodgett* v. *Holden*, 275 U.S. 142, 147 (1927); *United States* v. *Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, J., concurring) (a period of retroactivity longer than one year preceding the legislative session in which it was enacted raises "serious constitutional questions").

Consolidated review of the challenges to EPACT will permit the statute to be considered in a coherent fashion.[15]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[15] Petitioner's specific suggestion is that the Court grant certiorari in the *Commonwealth Edison* Petition, which clearly presents both the contractual and constitutional issues. Alternatively, if the Court prefers to address those issues separately, it could grant certiorari in this Petition as well.